Caplin & (and) Drysdale, Chartered v. United States and United States v. Monsanto: "The War on Drugs" Gets a New Recruit

Kathleen A. Ravotti

Follow this and additional works at: http://lawecommons.luc.edu/luclj

Part of the Constitutional Law Commons

Recommended Citation
Available at: http://lawecommons.luc.edu/luclj/vol22/iss1/9

This Note is brought to you for free and open access by LAW eCommons. It has been accepted for inclusion in Loyola University Chicago Law Journal by an authorized administrator of LAW eCommons. For more information, please contact law-library@luc.edu.
Caplin & Drysdale, Chartered v. United States and United States v. Monsanto: The "War on Drugs" Gets a New Recruit

I. INTRODUCTION

As America entered the eighties, few people denied that the escalation in drug trafficking and drug-related crime posed one of the most pressing problems facing our nation. Indeed, in the 1988 presidential election, the issue attained paramount importance in both the Republican and Democratic campaign platforms. President Bush labeled the drug problem public enemy number one; accordingly, he established a separate agency to head up the fight, appointed William Bennett as "drug czar," and outlined a 7.9 billion dollar strategy.

President Bush's official commitment to the war on drugs was tested in the first year of his administration by the December 1989 crisis involving Panamanian President, General Manuel Antonio

1. By 1989, a Gallup Poll indicated that the American public viewed illegal drugs as the most important problem facing the country. N.Y. Times, July 25, 1990, at A9, col. 5. Another poll revealed that 85% of Americans would support penalties such as the temporary suspension of a driver's license, seizure of cars used to buy or carry drugs, and community service sentences against even casual users of illegal drugs. Get Tough on Users, NEWSWEEK, Sept. 18, 1989, at 18, 23. Thirty-four percent of the American public would support a one percent surtax to personal income taxes to raise money for the fight against illegal drugs, and 65% would support a one percent surtax to corporate income taxes. Id.

2. Inaugural Address to the Nation, 135 Cong. Rec. S68-69 (daily ed. Jan. 20, 1989). In his address, President Bush stated:

There are few clear areas in which we as a society must rise up united and express our intolerance. The most obvious now is drugs. And when that first cocaine was smuggled in on a ship, it may as well have been a deadly bacteria, so much has it hurt the body, the soul of our country. And there is much to be done and to be said. But take my word for it: This scourge will stop.

Id. at S69.


4. Now It's Bush's War, NEWSWEEK, Sept. 18, 1989, at 22. President Bush stated that illegal drugs were "the gravest domestic threat facing our nation today." Id. Gallup polls revealed that Americans plainly wanted decisive action in the war on drugs and hungered for quick results, probably the biggest political problem facing both President Bush and William Bennett. Id.
Noriega. In response to Noriega's declaration of war against the United States, President Bush authorized "Operation Just Cause," at the time the largest United States military airlift since Vietnam. This operation sent the United States military into Panama to secure the surrender of General Noriega, the person believed to be responsible for massive shipments of illegal drugs into the United States. Reactions in the United States to Noriega's capture and subsequent imprisonment revealed that the public supported the President's use of strong-arm tactics in the war against drugs.

The public mandate for a frontal assault on the drug problem had been building for a decade. In 1980, Congress resolved to strengthen existing anti-drug legislation because law enforcement agencies were not using these statutes aggressively to attack the growing drug menace. Congress's strategy to this end was to remove the profit incentive in drug trafficking. The result of this strategy was the Comprehensive Forfeiture Act of 1984 (Forfeiture Act).

---

6. Among the stated goals of the United States military forces was to bring Noriega to justice in the United States, where he had been indicted in May 1988 for drug-trafficking. *Id.* at 14-19. Noriega allegedly permitted Colombia's Medellin cartel to use Panama as a transshipment point for cocaine headed for the United States. *Id.* at 15.
7. A Gallup Poll indicated that 80% of Americans believed that the United States was justified in sending military forces to invade Panama and overthrow Noriega. *The Panama Invasion: A Newsweek Poll*, NEWSWEEK, Jan. 1, 1990, at 14, 22.
9. S. REP. No. 225, 98th Cong., 1st Sess. 191 (1983), reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS, 98th Cong., 2d Sess. 3182, 3374 [hereinafter SENATE REPORT] ([one reason] for the failure of forfeiture statutes — which in 1970 were proclaimed to be the ideal weapon for breaking the backs of sophisticated narcotics operations — w[as] that Federal law enforcement agencies had not aggressively pursued forfeiture"). Without vigorous enforcement by the Justice Department, the statutes posed no real threat to criminals with the economic resources to absorb the routine penalties imposed. *Id.* In a ten year period beginning in 1970, when the forfeiture provisions were first implemented, only 98 cases (involving approximately two million dollars in actually or potentially forfeitable assets) returned indictments seeking forfeitures. United States v. Nichols, 841 F.2d 1485, 1487 (10th Cir. 1988) (citing GENERAL ACCOUNTING OFFICE, ASSET FORFEITURE-A SELDOM USED TOOL IN COMBATTING DRUG TRAFFICKING at ii (1981) [hereinafter ASSET FORFEITURE]). Yet trade in illegal drugs "generated an estimated sixty billion dollars annually." *Id.* at 1488.
10. Cloud, *Forfeiting Defense Attorneys' Fees: Applying an Institutional Role Theory to Define Individual Constitutional Rights*, 1987 Wis. L. REV. 1, 16 (1987) (Congress predicted that if the forfeiture provision was implemented correctly, "criminals w[ould] lose the economic benefits of their illicit behavior and eventually organized crime, deprived of its raison d'etre, should simply wither away").
The Forfeiture Act is designed to undercut the enormous power wielded by organized crime and drug lords by striking at the heart of these enterprises: their economic base.\textsuperscript{12} The Forfeiture Act seeks to accomplish this goal by expanding the criminal forfeiture provisions of the Racketeer Influence and Corrupt Organization Act (RICO)\textsuperscript{13} and the Continuing Criminal Enterprise Statute (CCE).\textsuperscript{14}

More recently, the judicial branch of the government has joined the fray, strengthening the arsenal available to law enforcement agencies in conducting the war on drugs. In \textit{Caplin \& Drysdale, Chartered v. United States}\textsuperscript{15} and \textit{United States v. Monsanto},\textsuperscript{16} the Supreme Court considered whether the government could use the Forfeiture Act to freeze the assets of a defendant charged under RICO or CCE, even when such a freeze prevented the defendant from retaining the defense counsel of his choice. Despite a long

\textsuperscript{12} See S. REP. NO. 224, 98th Cong., 1st Sess. 13 (1983) ("[profit is the motivation for this criminal activity, and it is through economic power that it is sustained and grows").

\textsuperscript{13} 18 U.S.C. §§ 1961-1968 (1988). The Forfeiture Act affected RICO in several ways. The forfeiture provision of RICO, section 1963(a), was amended to provide for the forfeiture of both direct and derivative proceeds obtained from racketeering activities. \textit{SENATE REPORT, supra} note 9, at 199. Section 1963(b), as amended, emphasizes that "either real property or tangible or intangible personal property" is subject to forfeiture. \textit{Id.} at 200. The Forfeiture Act changed section 1963(e) to allow the courts "to enter restraining orders to preserve the availability of forfeitable assets until the conclusion of trial." \textit{Id.} at 202. The Forfeiture Act also added a new procedure, section 1963(m), whereby interested "third part[ies can assert] a legal interest in the property ordered forfeited [by] petition[ing] the court for a hearing to adjudicate the validity of [their] alleged interest[s]." \textit{Id.} at 208.


\textsuperscript{15} 109 S. Ct. 2646 (1989).

\textsuperscript{16} 109 S. Ct. 2657 (1989).
line of cases recognizing the sixth amendment right to counsel of choice, the Supreme Court broke new ground and announced that the government's interest in obtaining full recovery of potentially forfeitable assets supersedes that right.

This Note traces the legislative development of the 1984 Forfeiture Act and analyzes subsequent case law interpreting the Act. Concurrently, the Note highlights the inevitable clash between the Act's forfeiture provisions and a defendant's sixth amendment right to counsel. Next, the Note provides an in-depth analysis of the lower court decisions in Caplin & Drysdale, Chartered v. United States and United States v. Monsanto, as well as the Supreme Court's holdings in those cases. Finally, the Note criticizes the Court's decision to confront the sixth amendment issue, and its consequent dilution of the defendant's right to counsel under the sixth amendment.

II. BACKGROUND

A. The Forfeiture Act

In 1970, Congress enacted the criminal forfeiture provisions of RICO and CCE. These provisions reflect eighteenth century English law, which recognized forfeiture consequent to attainder. Congress enacted these statutes to give prosecutors "a powerful weapon in the fight against drug trafficking and racketeering." If

17. See, e.g., Wheat v. United States, 486 U.S. 153, 159 (1988) ("[t]he right to select and be represented by one's preferred attorney is comprehended by the Sixth Amendment"); Strickland v. Washington, 466 U.S. 668, 689 (1984) (the assistance of counsel is provided to ensure that every criminal defendant receives a fair trial); Powell v. Alabama, 287 U.S. 45, 53 (1932) (part of the sixth amendment's guarantee is the protection of a defendant's opportunity to obtain counsel of choice). The Supreme Court has also stated, however, that "the essential aim of the [Sixth] Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers." Wheat, 486 U.S. at 159.


21. See Brickey, Forfeiture of Attorneys' Fees: The Impact of RICO and CCE Forfeitures on the Right to Counsel, 72 VA. L. REV. 493 n.1 (1986) ("[u]pon a defendant's conviction for treason or a felony, all his goods and chattels were forfeited absolutely") (citing 4 W. BLACKSTONE, COMMENTARIES *381, *385). The criminal forfeiture provisions under RICO and CCE are in personam forfeitures in "that the court can acquire power or jurisdiction over the defendant himself as opposed to jurisdiction over his property." BLACK'S LAW DICTIONARY 791 (6th ed. 1990).

22. SENATE REPORT, supra note 9, at 194.
prosecutors employed the forfeiture provisions of RICO and CCE as anticipated, the government could “separate convicted criminals from their economic power bases” and score a significant gain against drug traffickers.

Much to Congress’s dismay, the Department of Justice did not implement these statutes as expected, but essentially ignored their potential for more than a decade. A 1981 General Accounting Office report revealed that the federal government was failing to take the profit incentive out of drug trafficking crimes. The report attributed the failure to two major causes: (1) the lack of aggressive pursuit of forfeiture of all drug-related property, and (2) the presence of “limitations and ambiguities” in the forfeiture statute. As a result, this study concluded, the Justice Department was not maximizing the potential of forfeiture as a law enforcement weapon.

Based on this report and its own recognition of the statute’s limitations, Congress passed the Forfeiture Act in 1984. The most

23. RICO is aimed at “the conduct, acquisition, and control of enterprises through patterns of racketeering activity”; CCE addresses “the operation of groups involved in patterns of serious drug offenses.” Id. at 193.
24. Brickey, supra note 21, at 495.
25. Blakey, Forfeiture of Legal Fees: Who Stands to Lose?, 36 EMORY L.J. 781, 787 (1987). Congress made several incorrect assumptions in drafting the forfeiture provision, which attributed to the mechanism’s initial failure. Congress assumed: “that the Department of Justice was committed to [a forfeiture] program”; that it would implement the provision “with discretion, but vigorously”; “that the federal judiciary would ... implement [the legislation] with care and discretion”; and that “the practicing bar ... would [approach the forfeiture provision with] intelligence and sympathy for the problem.” Id. As a result of these assumptions, the legislature drafted the provision broadly, a decision that quickly backfired. Id. Far from giving the statute “an imaginative or a vigorous implementation... [t]he federal judiciary came to the statutes as a country parson reading the first chapter of Genesis—with a dry and hostile literalism.” Id. at 788.
26. H.R. REP. No. 845, 98th Cong., 2d Sess., pt. 1, at 2 (1984) [hereinafter HOUSE REPORT]. This report confirmed Congress’s suspicions that the drug statutes were having no real impact. Drug traffickers continued to reap enormous profits and regarded financial penalties for drug dealing as just a “cost of doing business.” Id.; see also SENATE REPORT, supra note 9, at 191.
27. Senate Report, supra note 9, at 191.
28. Id.
29. Congress delineated four major shortcomings to the 1970 forfeiture statute. Id. at 194-97. First, “the scope of property subject to forfeiture ... [was] too limited ... [because RICO] exempt[ed] racketeering proceeds from [the] forfeiture scheme.” Id. at 194-95. Second, both the RICO and CCE forfeiture provisions “[did] not adequately address the serious problem of a defendant’s pretrial disposition of his assets [to third parties].” Id. at 196. “[B]y removing, transferring, or concealing their assets prior to conviction,” defendants could avoid forfeiture. Id. at 195. The lack of a standard for issuing restraining orders compounded this problem and made very real the threat of dissipated assets. Id. at 195-96. Third, Congress recognized that “the need to pursue virtually all drug-related property through civil proceedings” resulted in “a backlog of
significant provisions of the Forfeiture Act: (1) authorize forfeiture of "proceeds" that accrue to an enterprise or association through racketeering activity,31 (2) void preconviction transfers of assets in civil forfeiture cases unless a bona fide purchaser es-


SEC. 413. (a) Any person convicted of a violation of this title or title III . . .

(c) All right, title, and interest in property described in subsection (a) vests in the United States upon the commission of the act giving rise to the forfeiture under this section. Any such property that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture . . . , unless the transferee establishes in a hearing . . . that he is a bona fide purchaser for value of such property who at the time of the purchase was reasonably without cause to believe that the property was subject to forfeiture . . . .

(f)(1) Upon application of the United States, the court may enter a restraining order or injunction . . . to preserve the availability of property described in subsection (a) . . . —

(A) upon the filing of an indictment or information . . . for which criminal forfeiture may be ordered . . . and alleging that the property . . . would, in the event of conviction, be subject to forfeiture . . . ; or

(B) prior to the filing of such an indictment or information, if, after notice . . . and opportunity for a hearing, the court determines that —

(i) there is a substantial probability that the United States will prevail on the issue of forfeiture and that failure to enter the order will result in the property being . . . made unavailable for forfeiture; and

(ii) the need to preserve the availability of property . . . outweighs the hardship on any party against whom the order is to be entered . . .

Id. at 2044-46 (codified as amended at 21 U.S.C. § 853(a),(c),(e)(1) (1988)).

31. See 18 U.S.C. § 1963(a)(3) (1988); 21 U.S.C. § 853 (a)(1) (1988). Previously, courts held that racketeering proceeds did not fall under the RICO forfeiture net. See Senate Report, supra note 9, at 199. As amended, the Forfeiture Act's scope has been enlarged to include property "constitut[e], or . . . derived from, proceeds the defendant obtained through the racketeering activity . . . ," i.e., "proceeds accruing to an enterprise or association involved in a RICO violation." Id. Congress chose to use the term "proceeds" in order "to alleviate the unreasonable burden on the government of proving net profits." Id.
tablishes a valid claim, and (3) authorize the issuance of a protective order to preserve the availability of property either upon indictment, or before indictment, if the government shows probable cause that the property will be forfeited upon conviction.

Neither the original forfeiture provision nor the amending statute expressly mentions attorneys' fees. Before the 1984 amendment was passed, several courts interpreted the original forfeiture provision to apply to assets that a defendant intended to use to pay his attorney. After the Act was amended in 1984, however, many members of the legal community contended that Congress did not intend the forfeiture provision to reach assets transferred to an attorney for legitimate legal services, even if those assets were potentially forfeitable. Certain courts, however, refused to recognize an exception for attorneys' fees and decided the forfeiture issue based on whether the attorney was a "bona fide purchaser."

32. See 18 U.S.C. § 1963(c) (1988); 21 U.S.C. § 853(c) (1988). The addition of a "relation back" clause enabled the government to close one potential loophole of the statute as it previously stood. Senate Report, supra note 9, at 200. Prior to the relation back provision, "a defendant could attempt to avoid criminal forfeiture by transferring his property to another prior to conviction." Id. The government's interest in the property now vests at the time of the act giving rise to the forfeiture "and is not necessarily extinguished simply because the defendant subsequently transfers his interest to another." Id.


34. The legislative history of the Act is silent regarding legal fees. Hearings and debates contain only oblique references to the sixth amendment right to counsel problem. "Nothing in this section is intended to interfere with a person's Sixth Amendment right to counsel. The Committee, therefore, does not resolve the conflict in District Court opinions on the use of restraining orders that impinge on a person's right to retain counsel in a criminal case." See House Report, supra note 26, at 19 n.1.

35. See, e.g., United States v. Ray, 731 F.2d 1361, 1366 (9th Cir. 1984) (the court recognized the sixth amendment's protection of the right to retain counsel of one's choice, but because the district court appointed the same attorney sought by the defendant, and because the defendant had not shown that his choice was restricted, the defendant was not denied counsel of choice); United States v. Bello, 470 F. Supp. 723, 725 (S.D. Cal. 1979) (the court specifically stated that the right to counsel does not mean the right to counsel of choice, but that the alternative of appointed counsel would adequately protect the defendant's sixth amendment rights).

36. See, e.g., United States v. Badalamenti, 614 F. Supp. 194, 197-98 (S.D.N.Y. 1985) (the court distinguished between property a defendant intended to transfer to an attorney and property already transferred to an attorney; the latter was excluded by the court from the forfeiture provision's reach).

with an interest in the defendant’s assets that was superior to the
government’s interest. Although several courts interpreted the
bona fide purchaser provision broadly to exempt legal fees from the
government’s grasp, other courts construed the provision narrowly
and required forfeiture of assets that were used or intended to be
used to pay attorneys’ fees. Initially, courts skirted the issue of
the Forfeiture Act’s impact on a defendant’s sixth amendment
right to counsel.

B. Case Law Development

United States v. Rogers was the first case to interpret the forfei-
ture provisions of the Act. In Rogers, a grand jury returned a
thirty-count indictment, which included a racketeering charge,
against the named defendants. Contemporaneously with the fil-
ing of the indictment, the government sought a restraining order to
prohibit the disposition of allegedly forfeitable
property. Counsel
for the defendants made a conditional appearance to contest the
government’s position and moved to exclude legal fees from forfei-
ture. The attorneys argued that the Forfeiture Act did “not pro-
title of the seller, or one who pays valuable consideration, has no notice of outstanding

38. Compare United States v. Jones, 837 F.2d 1332, 1334 (5th Cir. 1988) (“the defense
attorney's necessary knowledge of the charges against his client cannot defeat his interest
in receiving payment out of the defendant's forfeited assets for legitimate legal services”),
rev’d, 877 F.2d 341 (5th Cir. 1989) (applying the Supreme Court’s decision in Caplin &
Drysdale, Chartered v. United States, 109 S.Ct. 2646 (1989)); United States v. Bassett,
632 F. Supp. 1308, 1315-16 (D. Md. 1986) (“the attorney representing a client under
indictment for a RICO violation or a [CCE] drug-related offense is ... certainly not . . .
just a bogus conduit for [his client's] money when providing bona fide legal services”)
(emphasis in original); and United States v. Ianniello, 644 F. Supp. 452, 455-56
(S.D.N.Y. 1985) (“it is evident that bona fide attorneys' fees paid to defense counsel who
serve the defendants' needs within our adversary system [are] not intended to be forfei-
table by Congress,” since such fees are neither “part of an artifice or sham to avoid forfei-
ture”) with United States v. Nichols, 841 F.2d 1485, 1493-94 (10th Cir. 1988) (the bona
fide purchaser exception “imposes the same conditions on attorneys as it does on any
other third party who seeks to defeat a forfeiture claim,” requiring forfeiture on “the
basis of the knowledge of the possibility of forfeiture, not on the basis of whether the
transaction was fraudulent”).

39. The sixth amendment guarantees that “in all criminal prosecutions, the accused
shall enjoy the right to have the assistance of counsel for his defense.” U.S. CONST.
amend. VI. For an analysis of the origin and importance of the sixth amendment right to
counsel of choice, see Winick, Forfeiture of Attorneys' Fees Under RICO and CCE and the
Right to Counsel of Choice: The Constitutional Dilemma and How to Avoid It, 43 U.


41. Id. at 1334.

42. Id.

43. Id.
vide for the forfeiture of assets transferred by defendants to their attorneys for legitimate services performed." Alternatively, they contended that the new forfeiture provisions unconstitutionally violated fifth amendment due process, were "ex post facto laws as applied to these defendants," and denied the defendants of their sixth amendment right to counsel.

In ruling on the motion, the court interpreted the bona fide purchaser exception as evincing Congress's intent to treat assets in the hands of third parties differently from assets remaining in the defendant's possession. The court then looked to the Forfeiture Act's legislative history to determine which of a defendant's previously transferred assets were forfeitable. Although the section dealing with transfers of a defendant's property included sham or fraudulent transactions, the court concluded that the section did not apply to legitimate transactions. Therefore, the court held that a criminal defendant's payments to his attorney for legitimate legal services are not subject to forfeiture, because such transactions are neither a "sham" nor "fraudulent."

The United States District Court for the Southern District of New York confronted the Rogers issue in United States v. Badalamenti and United States v. Ianniello. In Badalamenti, the government sought to subpoena records that indicated the amount of fees already paid by the defendant to his attorney, with the intent...
of seeking forfeiture of those fees.\footnote{2} The defendant moved to quash the subpoena, arguing that it violated his right to counsel under the sixth amendment.\footnote{3} The district court adopted the Rogers approach, construing the Forfeiture Act narrowly because a broad interpretation, in the court’s view, would violate the sixth amendment right to counsel.\footnote{4} Judge Leval remarked that, read literally, the Forfeiture Act seems to embrace legal fees.\footnote{5} But, the judge reasoned, such a reading most likely would violate the sixth amendment and Congress could not have intended this result.\footnote{6} Therefore, the court held that forfeiture did not apply to money already paid by the defendant to his attorney in exchange for bona fide legal services.\footnote{7}

Similarly, the defendant in \textit{Ianniello} sought an order declaring attorneys’ fees exempt from RICO forfeiture.\footnote{8} Defense counsel

\footnote{2} Badalamenti, 614 F. Supp. at 195. The government sought the documents as evidence of the defendant’s crimes; namely, that the defendant derived “substantial income” from a “continuing criminal enterprise” and racketeering. \textit{Id.} The government had “reason to believe that [the attorney’s fee was] in the [range] of $500,000, and that the evidence of [the defendant’s] possession of such a sum to pay [for an] attorney [was] proof of . . . revenues from narcotics trafficking.” \textit{Id.} The government sought forfeiture of those funds from the attorney under both the RICO and CCE provisions. \textit{Id.} at 195-96.

\footnote{3} \textit{Id.} at 195.

\footnote{4} \textit{Id.} at 197-98.

\footnote{5} \textit{Id.} at 198.

\footnote{6} \textit{Id.}

\footnote{7} \textit{Id.} The court distinguished this case from United States v. Payden, 605 F. Supp. 839 (S.D.N.Y.), rev’d on other grounds, 767 F.2d 26 (2d Cir. 1985). The Payden case involved the defendant’s inability to retain a lawyer when “[his] funds . . . have been sequestered \textit{in anticipation of eventual forfeiture.}” \textit{Badalamenti,} 614 F. Supp. at 197 (citing Payden, 605 F. Supp. at 849 n.14 (emphasis added)). The attorney for the defendant in Payden was served a subpoena \textit{duces tecum} to “appear before the Grand Jury and disclose certain information regarding his fee arrangement with [the defendant].” Payden, 605 F. Supp. at 843. The court held that even if a lawyer is forced to withdraw from the case due to his inability to represent his client adequately under the circumstances or because he is discouraged due to the “ever-present threat that his . . . fees will eventually be forfeited,” the defendant’s sixth amendment rights are not compromised. \textit{Id.} at 853. The right to effective assistance of counsel, the court stated, does not translate into “the absolute right to counsel of one’s choice.” \textit{Id.} at 852. Thus, “merely requiring a defendant’s lawyer to testify does not . . . operate to deprive the accused of a fair trial.” \textit{Id.} at 851 (quoting United States v. Freeman, 519 F.2d 67, 68 (9th Cir. 1975)).

In contrast, the \textit{Badalamenti} court confronted the “problem of the subsequent forfeiture of the fee paid to an attorney.” \textit{Badalamenti,} 614 F.Supp. at 197. The court reasoned that the problem was not a constitutional one, but instead created a situation in which a wealthy defendant, who does not qualify for appointed counsel, may be unable to “obtain a lawyer \textit{at all} if the lawyer will incur forfeiture of his fee upon the client’s conviction.” \textit{Id.} at 197-98 (emphasis in original).

\footnote{8} United States v. Ianniello, 644 F. Supp. 452, 454 (S.D.N.Y. 1985). Section 1963(i), at issue in this case, allows a third party to “petition the court for a hearing to adjudicate the validity of his alleged interest in the property.” 18 U.S.C. § 1963(i)(2)
made a conditional appearance, at which he agreed to represent the defendant on stipulation that the court grant the order.59 The Ian-
niello court noted that when deciding among possible interpreta-
tions, courts generally are obliged to construe congressional acts as consistent with the Constitution.60 The court further reasoned that reading the Act to allow forfeiture of attorneys' fees would render the Act unconstitutional under the sixth amendment.61 Accordingly, the court concluded that Congress could not have intended such a result and held that attorneys' fees are exempt from RICO forfeiture.62

United States v. Thier63 was the only case to depart from the trend of excluding attorneys' fees from forfeiture.64 In Thier, the

(1988). The court shall amend the forfeiture order if the petitioner proves by a prepon-
derance of the evidence that he “has a legal right, title, or interest in the property, and such right, title, or interest renders the order of forfeiture invalid . . . ; or [that he] is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture . . . .” Id. § 1963(l)(6).

60. Id.
61. Id.

The District Court of Maryland also adopted the reasoning behind the Rogers, Badalamenti, and Ianniello decisions in considering the implications of attorney fee forfeitures. United States v. Bassett, 632 F. Supp. 1308, 1317 (D. Md. 1986), aff'd sub nom. United States v. Harvey, 814 F.2d 905 (4th Cir. 1987), superseded sub nom. In re Caplin & Drysdale, Chartered, 837 F.2d 637 (4th Cir. 1988) (en banc), aff'd sub nom. Caplin & Drysdale, Chartered v. United States, 109 S. Ct. 2646 (1989). In Bassett, the attorneys conditioned their continued representation of the client on the court's exemption of their fees from forfeiture. Id. at 1309. The defendants argued that “forcing their lawyers to forfeit their fees violates the defendants' constitutional right to counsel of choice; creates a potential conflict of interest between lawyer and client; undermines the attorney-client privilege and poses a threat to the adversary system.” Id. The government insisted, however, that the defendants only had a “qualified right [to counsel of choice] which must give way to the public interest if need be. . . . Forfeiture does not bar defendants from paying their lawyers with assets earned through legitimate enterprises. . . . Congress did not intend to exempt legal fees from the forfeiture provision.” Id. The court concluded that Congress did not intend to make attorneys' fees subject to forfeiture. Id. at 1317. The Bassett court arrived at this holding because “[t]o read the statute as including in the forfeiture provision the fees of attorneys is to violate Sixth Amendment principles.” Id.

63. 801 F.2d 1463 (5th Cir. 1986), modified, 809 F.2d 249 (5th Cir. 1987).
64. The district court granted the government's request for an ex parte restraining order on the strength of the grand jury indictment and the testimony of the assistant United States attorney, who presented evidence that the accused was involved in a marijuana smuggling operation. Id. at 1465-66. The district court reached its decision on statutory grounds, pointing to the absence of any legislative history that would indicate Congress intended to “exempt assets to pay attorneys fees and living expenses.” Id. at 1475.
district court denied the petitioner's motions to modify a restraining order to permit an exception for attorneys' fees. On appeal, the Fifth Circuit Court of Appeals agreed that attorneys' fees were not exempt from forfeiture, but allowed recovery of fees already paid. The appellate court limited its holding to assets remaining in the defendant's possession, stating that the Forfeiture Act clearly encompassed all property of a convicted defendant. In addressing the attorney who wished to pursue the legitimacy of his claims, the court noted that the Forfeiture Act provides a postconviction hearing for that purpose.

Thus, prior to the United States Supreme Court's consideration of the issue, most courts postulated that if legal fees were subject to forfeiture under the Act, no attorney would be "so foolish, ignorant, beholden, or idealistic" to represent a defendant under a RICO or CCE charge. Such an interpretation, many courts believed, rendered the forfeiture provision constitutionally vulnerable. As a result, courts often dodged the constitutional issue by construing the Act to exempt attorneys' fees from forfeiture. Other courts limited the scope of the Act by refusing to sanction the forfeiture of assets already transferred to attorneys for legitimate legal services. Overall, the trend among the courts was to

65. Id.
66. Id. at 1474.
67. Id.
68. Id. Because this was a pretrial hearing, the Fifth Circuit Court of Appeals did not reach the issue of postconviction attorney fee forfeitures. Id. at 1474. Rather, it stated that "the defendant's interest in obtaining counsel of choice and the possible adverse effects of a pretrial refusal to exempt defense counsel's fees from forfeiture are... not factors that mandate a particular result." Id. Instead, the court must balance "the defendant's interest in having access to funds" against "the government's interest in preventing the depletion of potentially forfeitable assets" and use its discretion in entering pretrial restraining orders. Id.

*But see* United States v. Payden, 605 F. Supp. 839 (S.D.N.Y.), rev'd on other grounds, 767 F.2d 26 (2d Cir. 1985). In that case, the court stated in dicta that "Rogers cannot be accepted as the law in this district." *Payden*, 605 F. Supp. at 849 n.14. Unlike *Rogers*, the *Payden* court did not include attorneys among those who might qualify under the bona fide purchaser exception. *Id.* Because an "indictment constitutes notice that the assets are subject to forfeiture, and a defendant's attorney certainly has actual notice of what is contained in the indictment," the attorney who accepts funds from his client under these circumstances has not "entered into an arms length transaction." *Id.* (citation omitted). In short, the *Payden* court "ha[d] little sympathy for [attorneys] even though the results of forfeiture may be harsh." *Id.*

70. *See supra* note 62 and accompanying text. These courts avoided the sixth amendment issue by adhering to the "canon of statutory construction that... an act should not be construed to violate the Constitution if a constitutional interpretation is possible." *Winick, supra* note 39, at 839.
avoid forfeiture of attorneys’ fees.

III. DISCUSSION

Against this background, and during the height of the drug war rhetoric, the United States Supreme Court granted certiorari in Caplin & Drysdale, Chartered v. United States and United States v. Monsanto. Both cases raised substantially the same issue: whether funds to pay attorneys’ fees are subject to seizure under the Forfeiture Act. The Court ruled that the broad statutory language unambiguously encompasses attorneys’ fees and that the Forfeiture Act does not conflict with a defendant’s constitutional rights under the fifth and sixth amendments. As a result, the government now can seize an accused’s assets before conviction or even before indictment and prevent the accused from using the potentially forfeitable assets toward legal fees. Even if the government does not seize assets prior to conviction, the government can capture the assets after trial if the defendant is convicted and the assets are traced to drug-related activity.

A. Caplin & Drysdale, Chartered v. United States

1. The Facts

In 1983, Christopher Reckmeyer hired the law firm of Caplin & Drysdale (Caplin) to represent him in an ongoing grand jury investigation by the State of Virginia. By the end of 1984, Reckmeyer owed Caplin $26,000 in legal fees. In mid-January, the investigation culminated in a forty-eight-count tax and drug indictment, which alleged that Reckmeyer operated a massive drug importation ring. One of the counts charged Reckmeyer with violating...
CCE.83 On the day of the indictment, before he was taken into
custody, Reckmeyer paid Caplin $25,000 in cash for preindictment
services, despite a pretrial restraining order forbidding Reckmeyer
from transferring any potentially forfeitable assets.84

Caplin continued to represent Reckmeyer, who was sentenced to
a prison term after pleading guilty to charges of engaging in a con-
tinuing criminal enterprise and violating the tax
laws.85 Following
Reckmeyer’s conviction and sentencing, the district court ordered
forfeiture of virtually all of Reckmeyer’s assets.86 Caplin sought a
determination of its property interest in Reckmeyer’s forfeited as-
sets.87 Specifically, Caplin claimed an interest in $170,000 of the
assets for legal services provided to Reckmeyer in addition to the
$25,000 already paid by the client.88 Caplin asserted that the assets
which a defendant uses to pay an attorney are exempt from the
Forfeiture Act’s broad net; alternatively, Caplin argued that if the
Act does not create an exemption for attorneys fees, it infringes
on the defendant’s right to counsel and is, therefore, unconstitutional.89

hashish in 50 transactions and laundered the profits, resulting in millions of dollars of
personal income to Reckmeyer. Id.
84. Caplin, 837 F.2d at 641. The government obtained an ex parte restraining order
under CCE on January 14, 1985. Id. The order prohibited Reckmeyer from transferring
any of his assets. Id.
86. Id. Reckmeyer’s assets included real estate, gems, and $200,000 in cash. Id. The
forfeiture order specifically included “[a]ll monies and funds restrained by January 14,
1985, restraining order entered in the above styled case, including but not limited to the
approximately $25,000 held in escrow by Bernard S. Bailor [a member of the law firm of
Caplin & Drysdale] and/or his agents.” Id.
87. Id. One section of the Forfeiture Act, entitled “Third party interests,” provides:
Any person, other than the defendant, asserting a legal interest in property
which has been ordered forfeited to the United States pursuant to this section
may, within thirty days of the final publication of notice or his receipt of notice
under paragraph (1), whichever is earlier, petition the court for a hearing to
adjudicate the validity of his alleged interest in the property. The hearing shall
be held before the court alone, without a jury.
If, after the hearing, the court determines that the petitioner has established
by a preponderance of the evidence that . . . (B) the petitioner is a bona fide
purchaser for value of the right, title, or interest in the property and was at the
time of purchase reasonably without cause to believe that the property was sub-
ject to forfeiture under this section; the court shall amend the order of forfeiture
in accordance with its determination.
Id. § 853(n)(6).
88. Reckmeyer, 631 F. Supp. at 1193. The $25,000 was being held in escrow for
Caplin by its agent. See supra note 86.
2. The Procedural History

The United States District Court for the Eastern District of Virginia first rejected the government's argument that Caplin lacked standing to assert its claim.\(^9\) The court then turned to the question of forfeiture of counsel fees and costs.\(^9\) The district court ruled that Caplin had a legitimate property interest in the forfeited assets.\(^9\) The court did not reach the constitutional issue. Rather, it avoided the sixth amendment argument by ruling that the forfeiture provision does not apply to attorneys' fees.\(^9\) Accordingly, it granted Caplin's claim.\(^9\)

On appeal, the United States Court of Appeals for the Fourth Circuit affirmed on other grounds.\(^9\) The three-justice panel held that the Forfeiture Act does not expressly exempt attorneys' fees from forfeiture, but its failure to do so impermissibly infringes upon the defendant's sixth amendment right to counsel, rendering the provision unconstitutional.\(^9\)

Subsequently, the Fourth Circuit granted the government's petition for a rehearing en banc.\(^9\) The court again ruled that the Forfeiture Act's unambiguous language provides no exemption for

---

90. *Id.* at 1194. The section of the Forfeiture Act that governs third-party interests provides, *inter alia*, that the court shall amend its forfeiture order if the petitioner establishes by a preponderance of the evidence that he has a "superior . . . right, title, or interest . . . at the time of the commission of the acts which gave rise to the forfeiture . . . or . . . the petitioner is a bona fide purchaser for value . . . and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture . . . ." 21 U.S.C. § 853(n)(6) (1988). However, the legislative history of this provision states: "'Third parties who assert claims to criminally forfeitable property, which in essence are challenges to the validity of the order of forfeiture, are entitled to a judicial determination of their claim.'" *Reckmeyer*, 631 F. Supp. at 1194 (quoting *SENATE REPORT*, *supra* note 9, at 208). Based on the legislative history, the district court concluded that Caplin was a "good faith provider of services" with standing to present its claims, even though the firm did not qualify for relief as a bona fide purchaser under the Act. *Id.*


92. *Id.* The court described Caplin's status as "at least equal to that of a general creditor." *Id.* The court had previously held that under the Forfeiture Act a general creditor is accorded the opportunity to establish a valid claim to the defendant's assets, which, otherwise are presumed to be forfeitable to the government. *Id.* at 1193 n.1.

93. *Id.* at 1194-96. The court cited *Rogers, Badalamenti, and Ianniello* in holding that Congress did not intend for the Forfeiture Act to "encompass bona fide legal fees paid to a criminal defendant's attorney." *Id.* at 1195 (citations omitted).

94. *Id.* at 1198.


96. *Id.*

attorneys’ fees. In reconsidering the constitutional issue, however, a majority of the court reversed its prior decision and held that the statutory scheme does not violate a defendant’s sixth amendment rights. Four justices dissented, agreeing with the original panel’s view that the Forfeiture Act violates the sixth amendment because it fails to exempt legal fees from confiscation.

B. United States v. Monsanto

1. The Facts

In a similar case two years later, the government returned an indictment that charged Peter Monsanto with two RICO counts, one CCE count, several firearms counts, and one drug conspiracy count. This time, however, the government sought forfeiture of

98. Id. at 640-42.
99. Id. at 642-48. The court began by stating that a criminal defendant has the absolute right to representation either by retained counsel or by appointed counsel. Id. at 643. The court rejected the scenario of drug defendants being forced to conduct their own defense as an unrealistic hypothesis. Id. Further, the court dismissed Caplin’s argument that “the presumption of innocence forbids any interference with a defendant’s property prior to a guilty verdict.” Id. The court emphasized that the presumption of innocence is important “in assigning the burden of proof at trial, but is not a grant of immunity from pretrial inconvenience.” Id. Although due process strictures do not convey an absolute right to be free from pretrial inconveniences, the court did concede that an objection to pretrial inconveniences based on procedures might succeed. Id. at 644. However, Caplin did not bring a due process challenge before the court. Id.

Having established that the right to counsel of one’s choosing is a “qualified” right, the court held that the Forfeiture Act does not violate the sixth amendment. Id. The court cited many grounds for its decision. First, the court refused to accord “a unique and favored constitutional status” to the class of criminal defendants unable to hire counsel with their own assets. Id. at 646. Second, the court rejected the contention that “appointed counsel are presumptively unqualified to handle [CCE] cases.” Id. Third, the court did not accept the assertion that “fee forfeiture . . . [would] create impediments to attorney-client communication and conflicts of interest” and stated that this danger is “more theoretical than real.” Id. at 647. Finally, the court stated that an outright ban on fee forfeiture would be an “unwarranted judicial intervention into the legislative arena.” Id. at 648. Because fee forfeiture may support important public interests, the court held that the “balancing of personal and public interests is presumptively a matter of legislative prerogative.” Id. at 648-49.

100. Id. at 651-53 (Phillips, J., dissenting). “The sixth amendment prevents governmental freeze orders and forfeitures whose effect is to deprive criminal defendants of their ability, otherwise present, to employ private counsel for their defense against the underlying charges on which the freeze order or forfeiture is based.” Id. at 652-53 (Phillips, J., dissenting).

101. United States v. Monsanto, 836 F.2d 74, 75-76 (2d Cir. 1987), modified, 852 F.2d 1400 (2d Cir. 1988) (en banc), rev’d, 109 S. Ct. 2657 (1989). Monsanto allegedly directed a large-scale heroin distribution enterprise and had accumulated various assets as a result of his narcotics trafficking, specifically two parcels of residential real property valued at $365,000 plus $35,000 in cash. Id. at 76.
Monsanto's assets before trial by requesting an \textit{ex parte} postindictment restraining order under the Forfeiture Act.\textsuperscript{102} The district court granted the motion, freezing the specified assets pending trial.\textsuperscript{103}

Monsanto attempted to secure private counsel, but several attorneys declined to represent him because of the threat of fee forfeiture.\textsuperscript{104} Counsel \textit{pro tem} intervened on Monsanto's behalf and petitioned the court to vacate or modify the restraining order to allow Monsanto to secure private counsel.\textsuperscript{105} Counsel also sought a declaration that if the relief were granted and the assets became available to pay attorneys' fees, the government could not employ the Forfeiture Act's third-party transfer clause\textsuperscript{106} to reclaim the payments if Monsanto subsequently were convicted.\textsuperscript{107} Failure to modify the restraining order, counsel insisted, would interfere with Monsanto's sixth amendment right to counsel of his choice.\textsuperscript{108}

At a hearing, counsel \textit{pro tem} informed the court that Monsanto had contacted several trial attorneys, but none of them were willing to represent Monsanto for the amount of compensation provided by the Criminal Justice Act.\textsuperscript{109} The trial judge conceded that Monsanto was effectively indigent as a result of the restraining order.\textsuperscript{110}

2. The Procedural History

The district court denied Monsanto's motion to modify the restraining order.\textsuperscript{111} The court interpreted the forfeiture provision to


\textsuperscript{103} Monsanto, 836 F.2d at 76. The order prohibited Monsanto from "alienating or in any way depreciating [the] two parcels of real property . . . specified in [the] indictment as constituting and derived from the proceeds of violations of [CCE]." Id. at 75 (citing 21 U.S.C. § 848 (1982 and Supp. III 1985)). The government did not seek forfeiture of the $35,000 in cash under the order. Id. at 76 n.2.

\textsuperscript{104} Id. At the initial pretrial conference, an attorney from Boston audited the proceedings but declined to enter a formal appearance on Monsanto's behalf. Id. The assistant United States attorney made clear that he would not enter into an agreement to exempt attorneys' fees from forfeiture. Id. Nor would the trial justice allow an exemption from fee forfeiture in excess of the hourly rates established by the Criminal Justice Act. Id.; see 18 U.S.C. § 3006A(d) (1988).

\textsuperscript{105} Id.

\textsuperscript{106} 21 U.S.C. § 853(c) (1988); see also supra note 30 (quoting Forfeiture Act § 413(c) (codified at 21 U.S.C. § 853(c) (1988))).

\textsuperscript{107} Monsanto, 836 F.2d at 84.

\textsuperscript{108} Id. at 75-76.

\textsuperscript{109} Monsanto, 836 F.2d at 76.

\textsuperscript{110} Id.; see 18 U.S.C. § 3006A(d) (1988).

\textsuperscript{111} Id.
null
If the government does not meet its burden at the adversarial hearing,\(^\text{120}\) the court noted, the district court should order that any funds used to pay legitimate attorneys' fees will be exempt from posttrial forfeiture.\(^\text{121}\) The Second Circuit remanded the case for an adversarial hearing, at which the government had to establish the likelihood of Monsanto's conviction and the probability that the targeted property was potentially forfeitable.\(^\text{122}\)

On remand, the district court upheld the restraining order because the government had met its burden in establishing by a preponderance of the evidence that Monsanto's assets were most likely subject to forfeiture.\(^\text{123}\) While Monsanto's trial was in progress, the Second Circuit vacated its earlier holding and heard Monsanto's appeal en banc.\(^\text{124}\) This time, the appellate court ordered the district court to modify its restraining order by allowing Monsanto to use the frozen assets to pay his attorneys' fees.\(^\text{125}\) In reaching its decision, however, the appellate court was sharply divided.\(^\text{126}\) Three judges found that the order violated the sixth amendment;\(^\text{127}\) three judges invalidated the order on statutory

---

120. The court of appeals concurred in the view that the government must demonstrate beyond a reasonable doubt both that the defendant has violated the statute and that the assets are subject to forfeiture. Id. (citing United States v. Lewis, 759 F.2d 1316, 1324 (8th Cir.), cert. denied, 474 U.S. 994 (1985); United States v. Spilotro, 680 F.2d 612, 618 (9th Cir. 1982); United States v. Long, 654 F.2d 911, 915 (3d Cir. 1981)). The court also stated that the government must meet this burden with evidence independent of the indictment. Id.

121. Id. at 84.

122. Id. at 85.


124. Id. Monsanto's trial was in progress in the district court where he was represented by court-appointed counsel. Id.

125. Id. The court also held that "any such fees paid to Monsanto's defense counsel [were] exempt from subsequent forfeiture pursuant to 21 U.S.C. § 853(c)." Id.; see also supra note 30 (quoting Forfeiture Act § 413(c) (codified at 21 U.S.C. § 853(c) (1988))).

126. Id. at 1402-21.

127. Id. at 1402-04 (Feinberg, C.J., concurring). These judges believed that "to the extent [that the forfeiture provisions] prevent an indicted defendant who would otherwise be able to retain counsel of his choice from doing so, they are unconstitutional." Id. at 1402 (Feinberg, C.J., concurring). Further, these judges did not believe that the majority's adversarial hearing was "sufficient to overcome the constitutional infirmities." Id. (Feinberg, C.J., concurring). The judges reached this conclusion by emphasizing that the sixth amendment secures a "fundamental right" that cannot be infringed absent a compelling governmental interest, and that the government's goal of preserving potentially forfeitable assets is not sufficiently "compelling." Id. at 1402-03 (Feinberg, C.J., concurring). They reasoned that the "small societal cost of allowing criminals to use their illegally obtained wealth to hire an attorney ... is the price [society] must pay for protecting
two judges found that the Forfeiture Act's failure to provide for a hearing such as the one ordered by the panel raised due process concerns; and the three dissenting judges argued to uphold the restraining order.

**C. The United States Supreme Court Decisions**

The United States Supreme Court granted certiorari in both cases to resolve the conflict among the circuits regarding the issue of attorney fee forfeiture. The judges distinguished the government's reliance on United States v. Salerno, 481 U.S. 739 (1987). In Salerno, the court held "that an accused's liberty interest may sometimes be overcome by the compelling governmental interest in coping with an immediate threat to public safety." Id. at 1403 (Feinberg, C.J., concurring).

The judges concluded that the statute in question does not permit the preconviction restraint of funds needed to make expenditures to retain private legal counsel, and that "expenditures expressly authorized by the district court for such purposes are not subject to postconviction forfeiture." Id. (Winter, J., concurring). Two of the dissenting judges disagreed with a "blanket rule exempting from forfeiture all assets required for non-sham counsel fees" and found all the concurring opinions that reached that result unpersuasive. Id. at 1418 (Mahoney, J., dissenting). Furthermore, they chastised the majority for its "virtually total disregard of every pertinent opinion from [the] sister circuits" that had reached contrary results on the issue of attorney fee forfeiture. Id. (Mahoney, J., dissenting).

**See, e.g.,** United States v. Moya-Gomez, 860 F.2d 706 (7th Cir. 1988) (a restraining order does not "violate defendant's Sixth Amendment right to counsel . . . but . . . violates due process if [the] defendant claims that it interferes with his ability to hire counsel and [the] Government does not demonstrate [that the assets are potentially forfeitable], or the court does not release sufficient funds to pay for counsel"); United States v. Nichols, 841 F.2d 1485 (10th Cir. 1988) (forfeiture provision provides no exception for
sues associated with fee forfeiture. In its decisions, the Court affirmed the Fourth Circuit's ruling in *Caplin & Drysdale, Chartered v. United States* and reversed the Second Circuit's holding in *United States v. Monsanto*. The majority arrived at three major holdings: (1) proceeds intended for payment of attorneys' fees are not exempt from forfeiture; (2) forfeiture is mandatory whether under a postconviction order or a pretrial restraining order, allowing no room for the exercise of judicial discretion; and (3) the Forfeiture Act violates neither the fifth nor the sixth amendment rights of the defendant.

1. The Forfeiture Act Provides No Exception for Attorneys' Fees

The Supreme Court first analyzed the scope of the Forfeiture Act. The Court rejected Monsanto's contention that the Forfeiture Act is ambiguous. Instead, the Court ruled that the language of the Act is "broad and unambiguous." The Court reasoned that the statutory language unequivocally indicates that forfeiture is mandatory and supports no exception for attorneys' fees.

---

132. Both cases raised substantially the same issues: forfeiture of attorneys' fees and the sixth amendment right to counsel of choice. *Caplin & Drysdale, Chartered v. United States*, 109 S. Ct. 2646, 2649 (1989); *United States v. Monsanto*, 109 S. Ct. 2657, 2659 (1989). The majority wrote two separate opinions to resolve those issues, however, because petitioners in *Caplin* argued their status as "bona fide purchasers" with a valid claim against the forfeited assets, whereas the respondent in *Monsanto* challenged the validity of a pretrial restraining order that prevented him from liquidating any of his assets in order to obtain defense counsel of his choice.


134. *109 S. Ct. 2657* (1989), rev'g *852 F.2d 1400* (2d Cir. 1988) (en banc); see *supra* notes 125-31 and accompanying text.


139. *Id.* at 2662-63.

140. *Id.* at 2663.

141. *Id.* at 2662 (citing 21 U.S.C. § 853(a) (1988), which provides, *inter alia*, that a person "shall forfeit . . . any property" and a sentencing court "shall order" forfeiture of "all property described in this subsection"). The Court focused on the statutory language to emphasize that "Congress could not have chosen stronger words to express its intent
The Court also rejected the notion that because the Forfeiture Act does not expressly mention attorney's fees, Congress did not intend to require forfeiture of assets that could be used to pay them.\(^{142}\) Rather, the Court interpreted the absence of a phrase expressly including attorneys' fees as a further indication of the Forfeiture Act's breadth, not limitation.\(^{143}\) Likewise, Monsanto was unsuccessful in his attempts to persuade the Court that the Forfeiture Act's legislative history justifies a narrow construction of the statute.\(^{144}\)

Finally, the Court drew an analogy to the Victims of Crime Act (Crime Act),\(^{145}\) passed under the same bill as the Forfeiture Act.\(^{146}\) In the Crime Act, Congress deliberately provided that payments for legal representation of the defendant are exempt from forfeiture.\(^{147}\) The Court reasoned that when Congress expressly adopted such a provision in the Crime Act, it certainly understood the effect of omitting this exception from the Forfeiture Act.\(^{148}\) Thus,
the Court determined that attorneys’ fees are not exempt from forfeiture because “Congress did not write the statute that way.”

2. Forfeiture Is Mandatory Under the Act

The Forfeiture Act provides that “the court may enter a restraining order or injunction” to preserve a defendant’s forfeitable assets. The Second Circuit interpreted this language to mean that a trial judge could apply “traditional principles of equity” before granting the government’s request for a pretrial restraining order. The Supreme Court rejected this permissive reading and held that the Forfeiture Act does not give the trial court authority to allow a defendant to withhold assets to pay bona fide attorneys’ fees.

In reaching this conclusion, the Court looked to Congress’s purpose in enacting the Forfeiture Act, which was to guarantee that a defendant’s potentially forfeitable assets are preserved in the event of conviction. The Court reasoned that Congress inserted the very potent third-party transfer provision and “any property . . . any proceeds” language to insure the Forfeiture Act’s effectiveness. The Court refused to permit these powerful provisions to be “nullified by [another section] of the statute.” The Court stated that the Forfeiture Act does not give the district court discretion to dissipate the very property that Congress sought to preserve.

---

149. Id. (quoting United States v. Naftalin, 441 U.S. 768, 773 (1979)).
151. Monsanto, 109 S. Ct. at 2664 (quoting United States v. Monsanto, 852 F.2d 1400, 1406 (2d Cir. 1988) (en banc) (Winter, J., concurring)). In his concurring opinion below, Judge Winter concluded that “the purpose of the hearing [after the entry of a restraining order] is . . . to allow an informed balancing of the relative hardships on the parties . . . with regard to preconviction restraints upon a defendant’s assets.” Monsanto, 852 F.2d at 1406 (Winter, J., concurring). Such a balancing, Judge Winter concluded, “should be struck so as to allow a defendant to continue to make ordinary lawful expenditures, including expenditures to retain private legal counsel.” Id. (Winter, J., concurring).
152. Monsanto, 109 S. Ct. at 2665. 21 U.S.C. § 853(c) permits the forfeiture of a defendant’s assets after conviction; § 853(e) permits the government to freeze an accused’s assets after an indictment, but before conviction. 21 U.S.C. § 853(c), (e) (1988).
153. Monsanto, 109 S. Ct. at 2665 (quoting Senate Report, supra note 9, at 204).
154. 21 U.S.C. § 853(c) (1988); see also supra note 30 (quoting Forfeiture Act § 413(c) (codified at 21 U.S.C. § 853(c) (1988))).
156. Monsanto, 109 S. Ct. at 2665.
157. Id.
158. Id. The Court stated that Congress decided to give force to the old adage that
court, the Court remarked, it should amend the Forfeiture Act accordingly.\textsuperscript{159}

3. Constitutional Rights Are Not Compromised Under the Forfeiture Act

After disposing of the extraconstitutional challenges to the Forfeiture Act, the Court squarely confronted the sixth amendment question. In a three-step analysis, the majority dismissed the constitutional challenges to the Forfeiture Act.\textsuperscript{160} First, the Court considered Caplin's argument that, as interpreted, the Forfeiture Act impermissibly burdens a defendant's right "to select and be represented by one's preferred attorney."\textsuperscript{161} The Court found this assertion "unteachable" because the right to counsel does not grant the defendant the right to spend another person's money, even if the defendant has no other funds with which to hire private counsel.\textsuperscript{162} The Forfeiture Act, according to the Court, does not burden defendants unduly, because it allows the defendant to use assets not subject to forfeiture to retain an attorney and preserves the defendant's ability to obtain a government-paid attorney if necessary.\textsuperscript{163}

Second, the Court addressed the constitutionality of the Forfei-
ture Act's third-party transfer provision. Although it acknowledged the protections afforded by the sixth amendment, the Court ruled that those protections do not include the right to "give another's property to a third party," even when the transferor does so "to exercise a constitutionally protected right." Caplin attempted to distinguish the expenditure of forfeitable assets to exercise a right to counsel from the expenditure of assets in the pursuit of other constitutional rights. The Court, however, refused to elevate the sixth amendment to a special status or create a hierarchy among constitutional rights.

Third, the Court stated that the governmental interest in obtaining full recovery of forfeitable assets outweighs a defendant's sixth amendment interest in using suspect assets to pay for legal representation. The Court reiterated the notion that the sixth amendment does not grant a defendant the right to use the proceeds of crime to finance an expensive defense. In short, the Supreme Court's decision means that no antiforfeiture exception exists for the exercise of sixth amendment rights.

Finally, the Court summarily disposed of the fifth amendment issue. Both Caplin and Monsanto argued that the forfeiture provision upsets the "balance of forces between the accused and his accuser." In addressing this claim, the Court began by commenting that the fifth amendment adds nothing to a defendant's sixth amendment protections. Even if the fifth amendment adds

165. Caplin, 109 S. Ct. at 2653-54. The court reasoned that merely because the defendant transfers his assets to an attorney in the exercise of his constitutional right to counsel does not change the analysis of forfeitability. Id. If the attorney had reason to believe the assets were forfeitable, then he is excluded from the bona fide purchaser exception. Id.
166. Id. at 2654.
167. Id. For example, the Court noted that a defendant has no right to spend forfeitable assets for the exercise of his right to speak, practice his religion, or to travel. Id. Because the "full exercise of these rights, too, depends in part on one's financial wherewithal," and because those rights are just as important as the right to counsel, the Court would not elevate the sixth amendment to special status as the petitioner and respondent urged. Id.
168. Id. at 2654-55.
169. Id. at 2655 (citing In re Caplin & Drysdale, Chartered, 837 F.2d 637, 649 (4th Cir. 1988) (en banc), aff'd sub nom. Caplin & Drysdale, Chartered v. United States, 109 S. Ct. 2646 (1989)).
170. Id. at 2654.
171. Id. at 2656-57.
172. Id. at 2656 (quoting Wardius v. Oregon, 412 U.S. 470, 474 (1973)).
173. Id. The Court remarked that although "[t]he Constitution guarantees a fair trial through the Due Process Clauses . . . it defines the basic elements of a fair trial largely
additional safeguards, the Court stated, due process claims can be raised only in "specific cases of prosecutorial misconduct." On this basis, the Court rejected the notion that criminal laws with a mere potential for abuse require a finding of facial invalidity. Instead, particular abuses, if and when they occur, can be dealt with on a case-by-case basis by the lower courts.

D. The Dissent

Justice Blackmun, joined in dissent by Justices Brennan, Marshall, and Stevens, disagreed with the majority's statutory and constitutional interpretations. First, the dissent argued that the Forfeiture Act unambiguously reveals Congress's intent to exempt attorneys' fees from the forfeiture provision; therefore, the Court should not have addressed the constitutional issues. Second, the

through the several provisions of the Sixth Amendment." Id. (quoting Strickland v. Washington, 466 U.S. 668, 684-85 (1984)).

174. Id. at 2657. The Court noted that although an act "might operate unconstitutionally under some [hypothetical] set of circumstances," that fact alone does not render it invalid. Id. (quoting United States v. Salerno, 481 U.S. 739 (1987)).

175. Id. (quoting In re Caplin & Drysdale, Chartered, 837 F.2d 637, 648 (4th Cir. 1988) (en banc) ("[e]very criminal law carries with it a potential for abuse, but a potential for abuse does not require a finding of facial invalidity"), aff'd sub nom. Caplin & Drysdale, Chartered v. United States, 109 S. Ct. 2646 (1989)). The Court held that Caplin's argument "proves too much" since virtually every legal tool at the government's disposal carries a latent potential for abuse. Id.

176. Id.; see also Wheat v. United States, 486 U.S. 153, 163 (1988) (the Court declined to fashion a per se unconstitutional rule, instead observing that "trial courts are undoubtedly aware of [the] possibility of abuse, and would have to 'take it into consideration' when dealing with disqualification motions").

In addition, Monsanto argued that freezing an accused's assets before conviction and before a determination of which assets are forfeitable raises "distinct constitutional concerns." Monsanto, 109 S. Ct. at 2666. However, the Court held that the government may seize property after a showing of probable cause that the property eventually will be linked to the illegal activity. Id.; see also supra note 33. Furthermore, the Court reasoned that because the government is not outing the defendant from his property, but merely preventing him from disposing of it, the governmental intrusion in this context is even "less severe" than that permitted in other contexts. Monsanto, 109 S. Ct. at 2666. Therefore, the government can restrain the assets at issue after meeting the threshold burden. Id. at 2667.

177. Although the cases went up separately to the Supreme Court and the majority issued two separate opinions, the dissent wrote one opinion that applied to both cases. Caplin, 109 S. Ct. 2667 (1989) (Blackmun, J., dissenting).

178. Id. at 2667 (1989) (Blackmun, J., dissenting). Both the Caplin decision and the Monsanto decision were decided by 5-4 votes, indicating that the issue of fee forfeiture was and will continue to be a controversial issue.

179. Id. at 2668-72 (Blackmun, J., dissenting). The dissent's analysis was based on the "cardinal principle of statutory construction [that] statutes should be construed to avoid an unconstitutional interpretation." Winick, supra note 39, at 839; see also DeBartolo v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988) ("where an otherwise acceptable construction of a statute would raise serious con-
dissent stated that if Congress did intend the Forfeiture Act to reach attorneys' fees, then the forfeiture provision is clearly at odds with the sixth amendment right to counsel.180

1. The Forfeiture Act Provides an Exception for Attorneys' Fees

The dissent first stated that the Court could have resolved the dispute at the statutory level with a proper analysis of the language of the Forfeiture Act. The dissent pointed out that the majority acknowledged the Act's failure expressly to provide for the forfeiture of attorneys' fees.181 The dissent, however, rejected the majority's conclusion that the lack of an express exemption for attorneys' fees renders the Forfeiture Act unambiguous.182

Next, the dissent focused on the statutory language, which states that “any person convicted” shall forfeit property.183 That language, the dissent reasoned, does not govern property in possession of third parties, such as attorneys to whom assets have been transferred, because attorneys are not “persons convicted.”184 Rather, according to the dissent's analysis, the third-party transfer provision185 controls the disposition of assets in the attorney's possession.186 The dissent argued that the permissive language of that section vests the district courts with discretion to decide whether to restrain a defendant's assets.187

Similarly, the dissent noted that the Act's preconviction forfeiture provision188 employs the same discretionary language as the

---

181. *Id.* at 2668 (Blackmun, J., dissenting).
182. *Id.* (Blackmun, J., dissenting).
183. *Id.* (Blackmun, J., dissenting) (quoting 21 U.S.C. § 853(a) (1988)).
184. *Id.* (Blackmun, J., dissenting) (quoting 21 U.S.C. § 853(a) (1988)).
187. *Id.* at 2668-69 (Blackmun, J., dissenting).
third-party forfeiture section.\footnote{Caplin, 109 S. Ct. at 2669 (Blackmun, J., dissenting).} According to the dissent’s rationale, the government has no absolute right to forfeitable property, or to a court order safeguarding a defendant’s assets pending resolution of the criminal charges against him.\footnote{Id. at 2668-69 (Blackmun, J., dissenting).} Instead, the Forfeiture Act grants the district court discretion to decide whether to include attorneys’ fees in the special forfeiture verdict or to award preconviction injunctive relief.\footnote{Id. (Blackmun, J., dissenting).} The Forfeiture Act, then, is not “unambiguous” but is, after careful analysis, amenable to a different, nonconstitutional interpretation that, in the dissent’s view, the majority should have embraced.\footnote{Id. at 2668 (Blackmun, J., dissenting).}

Finally, the dissent criticized the majority for reading into the Forfeiture Act an overly broad purpose.\footnote{Id. at 2669 (Blackmun, J., dissenting).} According to the dissent, the majority’s analysis condones the forfeiture of property for its own sake, an interpretation of the Forfeiture Act that the dissent found to be clearly at odds with legislative intent.\footnote{Id. (Blackmun, J., dissenting).} The dissent remarked that no “important and legitimate purpose” is served by requiring postconviction forfeiture of funds earmarked as attorneys’ fees or barring preconviction payment of fees.\footnote{Id. at 2668 (Blackmun, J., dissenting).} On the contrary, the Forfeiture Act leaves room for a “statutory discretion” approach to forfeiture;\footnote{Id. at 2670 (Blackmun, J., dissenting).} in fact, the only correct construction of the Forfeiture Act, the dissent maintained, is one that gives full effect to its discretionary language while preserving the sixth amendment right to counsel.\footnote{Id. at 2671-72 (Blackmun, J., dissenting).}

2. A Defendant’s Sixth Amendment Rights Outweigh the Government’s Interests

Even if the Forfeiture Act is unambiguous and incapable of an alternate construction, the dissent concluded that the majority erred in its constitutional analysis. The dissent criticized the majority for emphasizing that because a defendant has no right to a
lawyer that he cannot afford, the government is free to restrain the defendant's assets and render him indigent. The dissent contended that the sixth amendment's right to counsel of choice plays a substantial role in preserving the adversarial system of criminal justice. Denial of the right to counsel of choice, the dissent stated, would negatively affect two components of the criminal justice system: the private defense bar and the individual defendant.

First, the dissent noted that although the courts have construed the sixth amendment to guarantee, at the least, "minimally effective assistance of counsel," the "preferred component" of the sixth amendment's protections is the right to hire private counsel. The looming threat of fee forfeiture, however, deflects even the "best-intentioned of attorneys" from accepting a case if they suspect that they will not be paid for their services. Such a scenario, the dissent argued, will discourage young attorneys from joining the defense bar and cause an "exodus of talented [defense] attorneys" already established in this field of law. The dissent warned that without "a healthy, independent defense bar" to ensure a "truly equal and adversarial presentation of the case," our system of criminal justice is imperiled.

Second, in the dissenters' view, the majority's holding imperils the defendant's ability to secure minimally effective legal counsel. The dissent argued that because the defendant may be

---

198. Id. at 2672 (Blackmun, J., dissenting) (quoting Wheat v. United States, 486 U.S. 153 (1988)).
199. Id. (Blackmun, J., dissenting). Justice Blackmun emphasized that the sixth amendment right to counsel of choice, which carves out an important role for the independent lawyer, functions as the "guardian of our freedom." Id. (citations omitted).
200. Id. at 2672-76 (Blackmun, J., dissenting).
201. Id. at 2672 (Blackmun, J., dissenting) (citing Strickland v. Washington, 466 U.S. 668 (1984)).
203. Id. at 2673 (Blackmun, J., dissenting).
204. Id. (Blackmun, J., dissenting) (quoting Winick, supra note 39, at 781). "The best attorneys in [the subspecialities of white collar and drug law bars] command shockingly high fees, although no more so than the most talented members of the securities, antitrust, commercial litigation, or personal injury bars." Winick, supra note 39, at 781. "Though the law's gradual transformation from a profession into a business is lamentable, in a society governed by the marketplace as ours is, attorneys... who find their hourly rates slashed to the $40 to $60 per hour limits provided under the C[rimal] J[ustice] A[ct] will move to other fields or decline to enter criminal practice." Id.
205. Caplin, 109 S. Ct. at 2674 (Blackmun, J., dissenting).
206. Id. at 2673-75 (Blackmun, J., dissenting). "[W]hen the government provides for
forced to accept the services of a court-appointed attorney, his relationship with that attorney is likely to begin on a hostile note, especially if the defendant had employed private counsel to represent him earlier in the proceedings.207 The defendant’s lack of trust in the qualifications of his court-appointed attorney will increase further, the dissent insisted, to the extent that the defendant might believe that the appointment of counsel is a government tactic to weaken his defense.208

Even if the defendant can find private counsel willing to risk forfeiture of her fees, the dissent opined, the efficacy of the relationship between the defendant and his attorney will suffer because “the attorney’s interest in knowing nothing” about the source of the client’s wealth is adverse to her “client’s interest in full disclosure.”209 The dissent surmised that the result of this conflict might be a less diligent investigation and presentation of the defendant’s case.210 Under either scenario, the dissent concluded, the majority’s construction of the Forfeiture Act threatens to undermine the adversarial system of justice.211

Third, the dissent argued that the alleged governmental interests appointed counsel, there is no guarantee that levels of compensation and staffing will be even average. . . . Without the defendant’s right to retain private counsel, the Government too readily could defeat its adversaries simply by outspending them.” Id. at 2673 (Blackmun, J., dissenting); see supra notes 17, 201 and accompanying text.


208. Id. (Blackmun, J., dissenting).

209. Id. at 2675 (Blackmun, J., dissenting).

210. Id. (Blackmun, J., dissenting).

211. Id. at 2674 (Blackmun, J., dissenting). The dissent was also disturbed by the power that the forfeiture provision cedes to the government and the potential for its use against a particularly talented defense attorney; that is, an “attorney who is better than what, in the Government’s view, the defendant deserves.” Id. at 2675 (Blackmun, J., dissenting). Presumably, the government will be hostile to the defense attorney because the government believes that the attorney has no right to receive payments out of the defendant’s assets on which, the government believes, it has a claim. Id. (Blackmun, J., dissenting). The forfeiture provisions, as interpreted by the majority, enable the government to dangle the threat of fee forfeiture over the attorney’s head throughout his representation of the defendant, making it necessary for the attorney to defend both his client’s interests and his own. Id. (Blackmun, J., dissenting).

The dissent also hypothesized that if the forfeiture mechanism is expanded to other types of crimes, soon only “affluent defendant[s] accused of a crime that generates no economic gain” will be able to retain private counsel. Id. (Blackmun, J., dissenting). One commentator has noted that the use of forfeiture as a method of punishment is likely to increase because it is seemingly an obvious solution to society’s burgeoning crime problem. Cloud, supra note 10, at 22. Undoubtedly, lawmakers will expand criminal forfeiture to other types of illegal activities, especially if the Forfeiture Act is a successful tool in the fight against illegal drugs. Id. at 22-23.
exalted by the majority were not persuasive.\textsuperscript{212} Depriving a defendant of "the best counsel money can buy"\textsuperscript{213} is not a substantial enough interest "to justify invasion of a constitutional right."\textsuperscript{214} Even if the government's interests are worthy, the dissent continued, the majority's construction of the Forfeiture Act's third-party transfer provision erects a statutory exemption for almost "legitimate provider[s] of services" except attorneys.\textsuperscript{215} Attorneys are in an unfortunate position because they will rarely, if ever, qualify under the bona fide purchaser exception.\textsuperscript{216} As a result, the dissent concluded, the Forfeiture Act's burden falls almost exclusively on the defendant's ability to exercise his constitutional right to obtain counsel.\textsuperscript{217}

Finally, the dissent rejected the notion that the probable cause\textsuperscript{218} hurdle serves as real protection against sixth amendment violations.\textsuperscript{219} The mere threat of forfeiture, insisted the dissent, will render any rational attorney reluctant to represent the accused regardless of whether the government can satisfy the statutory standard.\textsuperscript{220} In short, the dissent asserted that the majority's construction of the Forfeiture Act all but nullifies the long-established right to counsel afforded by the sixth amendment and nega-

\begin{itemize}
\item \textsuperscript{212} Caplin, 109 S. Ct. at 2676 (Blackmun, J., dissenting).
\item \textsuperscript{213} Id. (Blackmun, J. dissenting) (quoting Morris v. Slappy, 461 U.S. 1, 23 (1983) (Brennan, J., concurring)).
\item \textsuperscript{214} Id. (Blackmun, J., dissenting) (quoting United States v. Monsanto, 852 F.2d 1400, 1403 (2d Cir. 1988) (en banc) (Feinberg, C.J., concurring), rev'd, 109 S. Ct. 2657 (1989)). The dissent maintained that regardless of the government's alleged interests, it is trying to protect an interest in the defendant's assets when, in fact, it has no property interest in the defendant's assets before conviction. Id. at 2676-77 (Blackmun, J., dissenting).
\item \textsuperscript{215} Id. at 2678 (Blackmun, J., dissenting).
\item \textsuperscript{216} Id. (Blackmun, J., dissenting). The dissent singled out the defendant's attorney as the person most unlikely to qualify under the Forfeiture Act's bona fide purchaser exemption because the "attorney . . . cannot do his job (or at least cannot do his job well) without asking questions that will reveal the source of the defendant's assets." Id. (Blackmun, J., dissenting).
\item \textsuperscript{217} Id. (Blackmun, J., dissenting). The dissent conceded that criminal defendants certainly are not exempt from federal, state, and local taxes just because the taxes will cut into funds potentially available to pay an attorney. Id. n.16 (Blackmun, J., dissenting). The dissent insisted, however, that most observers would conclude that the current drug penalties, which target payments to criminal defense attorneys but exempt personal service transactions, place an undue burden on the defendant's exercise of sixth amendment rights. Id. at 2678 (Blackmun, J., dissenting). The burdening of a defendant's sixth amendment right to counsel is, in the dissent's view, not just an unfortunate consequence of the Forfeiture Act but the government's very purpose in enacting the statute. Id. (Blackmun, J., dissenting).
\item \textsuperscript{218} See supra note 33.
\item \textsuperscript{219} Id. at 2677 (Blackmun, J., dissenting).
\item \textsuperscript{220} Id. (Blackmun, J., dissenting).
\end{itemize}
tively impacts every interest protected by the sixth amendment, on both the individual and institutional levels.\textsuperscript{221}

IV. ANALYSIS

The Supreme Court's decisions in \textit{Caplin} and \textit{Monsanto} are significant in two respects: (1) they depart from the cardinal principle of statutory construction in favor of avoiding a constitutional interpretation when possible;\textsuperscript{222} and (2) they signal that in moments of public outrage, the judicial branch is willing to sacrifice basic constitutional rights in favor of the alleged needs of law enforcement agencies.\textsuperscript{223} The majority's ruling seriously jeopardizes the sixth amendment rights of RICO and CCE defendants,\textsuperscript{224} and writes a presumed congressional intent into the Forfeiture Act. In arriving at this result, the Court misread Congress's silence as an implied expression of affirmative intent and overstated the government's interest in obtaining full recovery of forfeited assets at the expense of the sixth amendment.

A. Room for a Statutory Exception Approach

Before the Court could address the constitutional issue, it had to reject the argument that the Forfeiture Act was capable of more than one interpretation. It did so by reading the Forfeiture Act's virtual silence regarding the use of assets for legal fees as support for a liberal construction of the Act.\textsuperscript{225} The Court, however, easily could have read the Forfeiture Act's silence for the opposite proposition: that Congress did not intend forfeiture to apply to attorneys' fees.\textsuperscript{226} Such an interpretation, in light of Congress's stated goal in passing the Act,\textsuperscript{227} would have left the Court with an opportunity to recognize a statutory exception for attorneys' fees.

The Forfeiture Act applies to any property and proceeds of the accused, but provides an exception for bona fide purchasers reasonably without cause to believe that the assets potentially were for-
Dentists, doctors, and the local grocer, who rarely know the true sources of a client's wealth, presumably will be able to resist any government-initiated forfeiture proceeding to recover assets in their possession.\textsuperscript{229}

Like dentists and doctors, criminal defense attorneys provide a service to the defendant. Because the service that they provide requires open and frank communication regarding sensitive criminal charges, however, criminal defense attorneys rarely will pass the "without cause to believe" test.\textsuperscript{230} As a consequence, the majority's interpretation of the Forfeiture Act apparently singles out defense attorneys for prejudicial treatment.

The Court misconstrued the real purpose of the forfeiture provision.\textsuperscript{231} Congress sought to separate convicted criminals from their economic power base and to close potential loopholes through the third-party transfer provision.\textsuperscript{232} Congress did not intend to eliminate private counsel from RICO and CCE prosecutions.

Because requiring forfeiture of assets transferred to attorneys in exchange for legitimate legal services effectively deprives the defendant of the use of his assets in the same way as a restraining order or injunction, "the government should be indifferent to the identity of the recipient of the assets."\textsuperscript{233} Under either scenario, the end result is the same: the defendant is prevented from pouring those assets back into the illegal enterprise. Therefore, it should be

\textsuperscript{228} See supra note 37 and accompanying text.  
\textsuperscript{229} Winick, supra note 39, at 785.  
\textsuperscript{230} Id. at 785-86. Winick states that the local grocer would likely qualify as a "bona fide purchaser . . . reasonably without cause to believe that the property was subject to forfeiture." 21 U.S.C. § 853(c) (1988). Criminal defense lawyers, on the other hand, invariably are on notice that their clients’ payments may be from the proceeds of crime. Winick, supra note 39, at 785. Because they will almost never qualify as bona fide purchasers due to the nature of attorney-client relationships, criminal defense lawyers are deterred from taking these cases, which drastically reduces their client base. Id. at 786. If the defense lawyer does accept a RICO- or CCE-related case, he may have to forfeit his fees to the government. Id. In the words of Scott Wallace of the National Association of Criminal Defense Lawyers, "The Clarence Darrows of the world will be doing wills for old ladies." Court Orders: Dealing with Porn and Drugs, Newsweek, July 3, 1989, at 20; see also Cocaine's "Dirty 300", Newsweek, Nov. 13, 1989, at 44 (the threat of asset seizures has forced one prominent defense attorney to drop most of his drug practice).  
\textsuperscript{231} [W]eakening the ability of an accused to defend himself at trial is an advantage for the government. But it is not a legitimate government interest that can be used to justify the invasion of a constitutional right.' And the legitimate interests the Government asserts are far too weak to justify the Act's substantial erosion of the defendant's Sixth Amendment rights. Caplin & Drysdale, Chartered v. United States, 109 S.Ct. 2667, 2676 (Blackmun, J., dissenting) (citations omitted).  
\textsuperscript{232} See supra notes 12, 32 and accompanying text.  
\textsuperscript{233} Cloud, supra note 10, at 46-47.
immaterial to the government if the defendant applies a portion of his assets toward financing a defense. Accordingly, because no legitimate purpose is served by requiring postconviction forfeiture of attorneys' fees or preventing preconviction payment of fees, the majority should have adopted a construction of the Forfeiture Act that preserves an exception for those fees.234

Finally, the Court pointed to Congress's failure to act on repeated suggestions by the defense bar to include an exemption for attorneys' fees as further evidence of congressional intent to make the Forfeiture Act expansive.235 One result of the majority's interpretation of the Act's application, however, is to aid the prosecution by depleting the pool of private defense counsel available to defendants. Regardless of Congress's stated or unstated intentions, the Court should not sanction a use of the Forfeiture Act that produces an unfair advantage. The Court has no obligation to defer to Congress when it enacts legislation in conflict with the constitutional guarantees of a fair trial. The majority could have restored the balance of forces between the government and the accused by resolving the issue of fee forfeiture in favor of the accused. Such a decision would have avoided a constitutional interpretation of the Forfeiture Act and protected the defendants' sixth amendment right to counsel.

B. Jeopardizing the Adversarial System of Justice

The majority's expansive interpretation of the Act made it necessary for the Court to resolve the constitutional issue. In light of the Court's longstanding acknowledgment of a defendant's fundamental and absolute right to the assistance of counsel,236 it is curious that the majority decided the sixth amendment dilemma as it did.237 The Court disposed with the argument that a defendant has

235. See supra note 159 and accompanying text.
236. Justice Black once noted:
   Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. . . . Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries.
   Gideon v. Wainwright, 372 U.S. 335, 344 (1963)); see also Glasser v. United States, 315 U.S. 60, 69 (1942) (the sixth amendment is one of the "bulwarks against the reach of arbitrary power" and is a " 'safeguard[] deemed necessary to insure fundamental human rights of life and liberty' ") (citation omitted).
a right to counsel of choice by focusing on case law that narrowly interpreted the scope of a defendant's sixth amendment rights. Consequently, the majority neglected the importance of the "distinct role of the right to counsel of choice in protecting the integrity of the judicial process." If, as the dissent suggested, forfeiture will dissuade defense attorneys from taking RICO or CCE cases, or from establishing a relationship with the accused "based upon confidential communications, vigorous advocacy, and independence from conflicts of interest," the Forfeiture Act seems to conflict with the sixth amendment. In fact, the Court's decisions in *Caplin* and *Monsanto* create many opportunities to abuse the Forfeiture Act and subvert the guarantees of the sixth amendment.

First, the majority's interpretation gives government prosecutors the power to render a defendant indigent by freezing his assets or by scaring off criminal defense attorneys with the threat of forfeiture. After the defendant is rendered de facto indigent, the government may appoint a government-trained, government-paid attorney to represent the very person whom government prosecutors seek to convict. Furthermore, the entire process, from indictment to trial, is conducted in a government-controlled court presided over by a government-paid judge. Because issuance of a pretrial restraining order is discretionary, the government can use the forfeiture provision selectively "to exclude only the 'best' defense attorneys from RICO and CCE cases." It is highly unlikely that Congress intended to instill such a potent weapon in the law enforcement branch absent an explicit legislative expression. Because this potential abuse threatens fundamental constitutional values and imperils the adversarial system, the Supreme Court should have resisted addressing the constitutional question and deferred to Congress.

Second, the majority's resolution of the constitutional issues leaves the defense bar in a precarious state. A private criminal at-

---

238. See *supra* notes 160-70 and accompanying text.
239. *Caplin*, 109 S. Ct. at 2672 (Blackmun, J., dissenting). For an extensive discussion of the fundamental right to counsel of choice and its important role in the United States's adversarial system of justice, see Winick, *supra* note 39, at 786-817.
242. Cloud, *supra* note 10, at 42-44. "The Department of Justice undoubtedly has discretion to select those cases in which to seek forfeiture of third party assets and restraining orders." *Id.* at 43 n.204.
244. For an in-depth discussion of the delegation doctrine, see *id.* at 853-65.
attorney accepting a RICO client has no guarantee of being paid unless the defendant has significant, nonforfeitable assets. A criminal defense attorney cannot accept a case on a contingent fee basis without violating the Model Rules of Professional Conduct. Consequently, the Court's decision will preclude many private defense attorneys from representing RICO and CCE clients.

This scenario threatens the adversarial system of justice and the federal defender program in a manner not contemplated by the majority. If the forfeiture provision conceivably can render every RICO or CCE defendant indigent, the court must appoint to each defendant an attorney under the Criminal Justice Act. RICO and CCE cases are lengthy and extremely complex, draining both the human and financial resources of the Justice Department. The added burden on public defender programs caused by the systematic substitution of appointed counsel for private counsel in these complex cases ultimately will fall on the truly indigent, who will have to compete for the Justice Department's limited resources. Thus, the Supreme Court has planted the seeds of many other sixth amendment problems by rejecting a statutory construction of the Forfeiture Act that exempts attorneys' fees.

V. IMPACT

The recent interpretation of the Forfeiture Act is most clearly illustrated by post-Caplin and -Monsanto decisions. Courts that have applied the Forfeiture Act's provisions, in light of the Supreme Court's holdings, almost unanimously have deprived the defendant of his assets, even when those assets were needed to pay


246. Cloud, supra note 10, at 35.

247. Id. at 47 n.224 (quoting United States v. Rogers, 602 F. Supp. 1332, 1349 (D. Colo. 1985) ("the costs of mounting a defense of an indictment under RICO are far beyond the resources or expertise of the average federal public defender's office which is already over taxed").


249. Cloud, supra note 10, at 47.

250. Winick, supra note 39, at 783. In essence, if the public defenders are consumed with preparing a defense in a complicated RICO or CCE case, defendants whose financial status leaves them with absolutely no option but to seek the services of the public defender's office might find that there is a lack of legal manpower for their needs.
War on Drugs

attorneys' fees.251

Ironically, the recent events surrounding deposed Panamanian dictator Manuel Noriega252 provide a perfect case study for the application of the Court's decision. From the time that the indictments were returned against Noriega some two years ago, many legal commentators have speculated that federal prosecutors are on shaky ground.253 Besides lacking concrete evidence of Noriega's role in drug distribution from South America to the United States, the prosecutors fear that Noriega's attorneys will adopt the "Ollie North defense."254

Not surprisingly, the government has seized every opportunity to debilitate Noriega's defense. With the Supreme Court's Caplin and Monsanto decisions firmly behind it, the government froze Noriega's bank accounts shortly after he was captured.255 Despite the entreaties of Noriega's attorneys, the government has refused to release those assets even to pay for Noriega's defense.256 In a dramatic gesture, Noriega's attorneys recently asked the court to be excused from representing him, arguing that they have been financially disabled as a result of the freeze order.257

The United States government attempted to reach an agreement with defense counsel to avoid a walk-out.258 Under the arrangement, the government would have paid the fees of Noriega's defense team.259 In a display of the government's new found leverage

251. "Any doubt as to the constitutionality of freezing assets and precluding entirely their use for payment of attorney fees . . . [has] now been resolved by the Supreme Court's recent decision[s] in United States v. Monsanto and Caplin & Drysdale, Chartered v. United States." FTC v. World Wide Factors, Ltd., 882 F.2d 344, 347 (9th Cir. 1989) (citations omitted); see also United States v. Unit No. 7 and Unit No. 8 of the Shop in Grove Condominium, 890 F.2d 82 (8th Cir. 1989) (forfeiture or pretrial restraint of property that would have been used to pay attorneys' fees does not violate fifth or sixth amendment).

252. See supra notes 5-7 and accompanying text.


254. Id. The "Ollie North defense" refers to a defendant's sometimes successful effort to play off sensitive material in his possession. Id. In this case, the government is speculating that Noriega possesses a wealth of information that could embarrass United States officials and jeopardize national security because of Noriega's former ties with the United States Central Intelligence Agency. Id. As a result, federal prosecutors and the Bush Administration realized early on that they were "bracing for a long and difficult struggle to convict the accused drug trafficker." Id. at 14.


256. Id.

257. Id.

258. Id.

259. Although the Criminal Justice Act limits legal fees to $75 per hour, the government was willing to pay Noriega's attorneys $350 per hour, the fee those attorneys usually command. Id.
in the context of attorneys’ fees, the government conditioned the arrangement upon obtaining promises from Noriega’s lawyers to withdraw its demand that the United States Central Intelligence Agency produce documents regarding years of secret payments to Noriega. The deal fell apart, however, after a hearing before United States District Judge William Hoeveler. The judge stated, “[t]here is no way that we can approve anything in excess of $75 [per hour].” Presumably, then, Noriega’s attorneys are “back to square one” in their fight to obtain standard fees out of their client’s assets.

VI. CONCLUSION

As a result of its decisions in Caplin & Drysdale, Chartered v. United States and United States v. Monsanto, the Supreme Court continues to chip away at the constitutional safeguards of defendants. The decisions are arguably a victory for those who support a hard-line approach to the drug war. However, most supporters of the Forfeiture Act, which strips an accused drug dealer of his assets, fail to recognize the fundamental constitutional issues at stake. At a minimum, the Court’s decisions foreshadow the future sacrifice of individual rights in face of society’s ever-mounting war against crime. If this trend continues unchecked, the Court’s decisions may be looked back upon as the first of many assaults on our nation’s adversarial system of justice.

KATHLEEN A. RAVOTTI

260. Id.
261. Id.
262. Id.
263. Id. Noriega’s attorneys have indicated that they might “challenge the constitutionality of the $75 cap on the ground that it violates their client’s right to counsel,” due to the complex circumstances of the case. Id.